No. ~~910~~ 252

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

FIRST NATIONAL BANK IN ST. LOUIS,
Petitioner,

vs.

STATE OF MISSOURI ex inf.
JESSE W. BARRETT,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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Authorities Cited in Brief.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, First National Bank in St. Louis, presents this its petition for a writ of *certiorari* to be directed to the Supreme Court of the State of Missouri, in the certain cause lately depending therein, numbered of that court 23,753, and therein entitled,

State of Missouri, *ex inf.* (sometimes *ex rel.*) Jesse W. Barrett, Attorney-General, v. First National Bank in St. Louis, respondent, and for cause therefor respectfully represents:

1. On June 27, 1922 (Rec. p. 1), the State of Missouri, through its Attorney-General, Jesse W. Barrett, filed in and presented to the Supreme Court of the State of Missouri its information, in which it was averred: That the petitioner, First National Bank in St. Louis, is a banking association organized under the laws of the United States; that its charter (meaning articles of association) and organization certificate specified the City of St. Louis, in the State of Missouri, as the place in which its banking business should be conducted; that for a number of years petitioner's banking house had been located on a certain corner in that city; that recently it had opened a branch office or bank at another named place in the City of St. Louis, and was also conducting the banking business at that point, receiving deposits, honoring checks, discounting bills, etc.

That petitioner proposed to establish other similar places for similar functions at other points in the City of St. Louis; that petitioner was without authority under the laws of the United States to have but a single banking house; that its acts in the premises were in contravention of the laws of the United States and of the State of Missouri.

The prayer was that, pending the cause, an injunction issue, and that upon final hearing petitioner be ousted of the franchise of maintaining branch offices for its banking business in the City of St. Louis.

2. On the day following (Rec., p. 7), the Court issued its alternative writ, demanding that petitioner appear and show cause on a day named by what authority it assumed to operate branch offices for the conduct of its banking business in the City of St. Louis.

3. At the same time (Rec., pp. 9-10) the Court without notice to petitioner, issued an injunction, restraining petitioner from establishing or conducting such branches (other than the one previously established) until the final determination of the cause.

4. On August 23, 1922 (Rec., p. 12), petitioner made and filed in the Supreme Court of Missouri its motion to dissolve this temporary injunction, because the same had been issued in violation of the terms of Revised Statutes of the United States, Sec. 5242, providing that no court of a State shall issue an injunction against a national banking association "before final judgment." No notice of this motion was taken by the Court, then or thereafter.

5. On September 8, 1922 (Rec., p. 14), petitioner made and filed in that court its motion to quash and

dismiss the alternative writ, on the ground that neither the State of Missouri nor the Attorney-General of that State possessed power to institute proceedings concerning the violation or alleged violation of the charter powers of the petitioner.

6. On October 24, 1922 (Rec., pp. 15-16) petitioner filed its demurrer to the information, in which it asserted that the information stated no facts entitling the State or the informant to relief; that the Court was without jurisdiction; that the matters complained of were such as only the Government of the United States could inquire into or complain of.

7. On the first day of November, 1922 (Rec., p. 18) the cause was argued at the bar of the Court.

8. On March 3rd, ~~1922,~~ the Court promulgated its opinion (Rec., pp. 19-20), holding that the State of Missouri had the power to restrain petitioner within the limits of the powers conferred upon it by the laws of the United States and that, under such laws, petitioner had no power to have more than one banking office or place of business within the City of St. Louis.

9. On the same day the Court pronounced final judgment (Rec., p. 19), ousting petitioner from the privilege of conducting any branch bank in the City of St. Louis.

10. The petitioner has sued out a writ of error to this Court from said judgment, but is advised by its counsel that some of the questions arising upon the record are not, or may not be, properly determinable upon the writ of error, and hence, to the end that this Court may consider of the cause upon its merits, it asks the allowance of a writ of *certiorari*.

11. In support of which application, petitioner assigns the following errors:

ASSIGNMENT OF ERRORS.

I.

The Supreme Court of Missouri was without jurisdiction to hear and determine this proceeding, or to award the relief sought by the State.

II.

The provisions of the acts of Congress conferring jurisdiction on the courts of the States, over actions against National Banking Associations (Section 57, Chapter 106, 13 Statutes at Large 116; and Section 24, Chapter 231, 36 Statutes at Large 1092) have no application to extraordinary, prerogative writs, such as here involved, and the Supreme Court of Missouri was without jurisdiction to entertain this proceeding.

III.

The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed visatorial powers over the petitioner, with respect to the manner of its exercise of its franchise as a banking association under the laws of the United States.

IV.

The Supreme Court of Missouri erred in holding and determining that the State of Missouri possessed the power to restrain petitioner by the writ of *quo warranto*, or a writ of that nature, in the exercise of a power claimed by petitioner to be granted it by the laws of the United States.

V.

The petitioner, being a banking association, organized and existing under the laws of the United States, and claiming and asserting under the acts of Congress relating to banking associations so organized, the right to establish branch banking offices within the limits of the City of St. Louis (its place of business designated in its charter), only the Government of the United States possesses the power to restrain the petitioner in respect thereto, and the Supreme Court of Missouri erred in determining otherwise.

VI.

The franchise or right asserted by the petitioner (of having branch offices or banks in the city designated in its articles of association as its place of business) being one granted or grantable only by the Government of the United States, therefore, only

the Government of the United States has the right or power to restrain the petitioner in the use of such asserted franchise or right, and the Supreme Court of Missouri is in error in holding and determining that the State of Missouri has the right so to do, in the manner in which it is attempted in this case.

VII.

The petitioner, having been created a banking association under the laws of the United States, the State of Missouri may not control the petitioner in the exercise of its corporate franchises, except to the extent authorized by act of Congress, and such control, in the manner in which it is attempted in this case, has not been so authorized.

VIII.

Neither the State of Missouri, nor the Attorney-General of the State of Missouri, had the power or authority to question the right of petitioner under its charter and the laws of the United States to establish and operate branch offices or banks in the City of St. Louis, State of Missouri.

IX.

Under its charter and the acts of Congress relating to National Banking Associations, the petitioner

was and is possessed of power to establish and maintain branch offices or branch banks within the limits of the City of St. Louis, in the State of Missouri, and the Supreme Court of Missouri erred in holding and determining to the contrary.

X.

If the opinion of the Supreme Court of Missouri is to be interpreted as holding that Sections 11,684 and 11,737 of the Revised Statutes of Missouri of 1919 are effective to restrict the powers of the petitioner derived from acts of Congress, or to authorize the State to maintain this proceeding, then such statutes are in violation of the Constitution of the United States—in the one aspect as legislation with respect to a subject-matter as to which only Congress may legislate; in the other as an attempt to confer upon the State prerogative rights of sovereignty which inhere only and exclusively in the National Government.

XI.

The writ here invoked, being a discretionary writ, the discretion applicable, being inherently a national discretion, the State, having obtained and insisted on maintaining a temporary injunction in violation of the plain provisions of an act of Congress, and equally

plain decisions of this and other courts upholding and enforcing it (R. S. U. S. 5242, Bank v. Mixter, 124 U. S. 721; Van Reed v. Bank, 198 U. S. 554; Hazen v. Bank, 70 Vt. 543; Freeman v. Bank, 160 Mass. 865; Meyers v. Bank, 10 Idaho, 175; Dennis v. Bank, 127 Cal. 453; Bank v. Bank, 40 Md. 269; *nem. con.*), and against efforts of the petitioner to dislodge it, by appealing to that act and those adjudications—in the exercise of a proper discretion here, upon a matter which concerns alone the National Government, the judgment should be reversed, with directions to dismiss the writ, because of the manner in which the State has proceeded; and to the end that the right of the petitioner, under its national charter, may be the subject of orderly investigation by the Government, to which alone the petitioner owes allegiance in the respects here under investigation.

Wherefore, the petitioner prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Missouri, requiring and directing the said Supreme Court of the State of Missouri, by and upon a date certain to be designated therein, to certify and send to this court a full, true and complete transcript of the record and proceedings in said Supreme Court of the State of Missouri, in the cause lately pending therein, entitled State of Mis-

souri, upon the information (or relation) of Jesse W. Barrett, Attorney-General, v. First National Bank in St. Louis, respondent, and numbered upon the docket of said court 22,753; to the end that the same may be reviewed by this Honorable Court; that the judgment of the Supreme Court of Missouri in said cause may be reversed for manifold and manifest errors therein appearing; and that the petitioner may have such other relief upon said writ, and in respect to said cause and judgment, as right and justice may require.

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LON O. HOCKER,
FRANK H. SULLIVAN,
EUGENE H. ANGERT,
Attorneys for Petitioner.

United States of America.
State of Missouri,
City of St. Louis. } ss.

Frank H. Sullivan, being duly sworn, deposes and says, that he is one of the counsel for the petitioner herein; that he prepared the foregoing petition and knows its contents, and that the statements therein contained are true as he verily believes.

FRANK H. SULLIVAN,

Subscribed and sworn to before me this 20th day of March, 1923.

My commission expires October 5, 1923.

MARY A. ANGERT,
Notary Public.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

It is not our intention to do more, at this time, than indicate the questions which inhere in this controversy; with no more argument, or citation, than is deemed necessary to enable the Court to determine the propriety of this application.

They are:

1. Whether a *state court* has jurisdiction of a high prerogative writ, such as here concerned, addressed to a banking association organized under the laws of the United States, *at the suit of whomsoever.*

2. Whether the *State* may exercise the sovereign right of restraining a *national bank* within the limits, or the supposed limits, of the powers conferred upon it by the General Government.

3. Whether a *state statute*, if interpreted as an attempt to *prohibit national banks* from maintaining branch offices in the cities in which their business is conducted, is a valid enactment, having in view the source of the corporate powers of such institutions.

4. Whether, under the acts of Congress, relating to national banking associations, such an institution

possesses power to establish, in the city designated in its charter and certificate as its place of business, branch offices for the better conduct of its business and accommodation of its patrons and the public. That these are each and all federal and national questions of the most fundamental character goes without saying. Under Judicial Code, Sec. 237, as amended by act of December 23, 1914, and of September 6, 1916 (Comp. Stat. United States, Sec. 1214; 36 Stat. 1156, Sec. 237; c. 2, 38 St. 790; Sec. 2, 39 St. 726), the scope of a *writ of error* is limited to the "validity of a * * * statute of or authority exercised under the United States," which has been denied; or where a statute or authority exercised under a state is claimed to be repugnant to the laws of the United States, but has been sustained. *Federal questions otherwise* arising are reviewable by the writ of *certiorari*.

Dahnke Walker Milling Co. v. Bondurant;
Lawyers Edition, Advance Opinions, Jan. 16, 1922, p. 114;
Ireland v. Woods, 246 U. S. 323.

It is our desire that the full ultimate merit of this controversy may be considered here. Therefore, and notwithstanding a writ of error has been sued out, we are asking the allowance of the writ of *certiorari*, so no question may remain as to the power of the

Court to fully consider the points to be urged, which seem to us to make for the invalidity of the judgment pronounced by the State Court.

1. The naked question of jurisdiction of the State Court is one which is not free from difficulty. *If the Government of the United States* had instituted this proceeding in the Supreme Court of the State, the power of that court to entertain the cause and delimit the powers of the bank under the acts of Congress, as between the sovereignty which created the bank and the bank itself, is a question of some doubt.

It was said by Mr. Justice Day, in Van Reed v. People's National Bank, 124 U. S. 721, in effect, that jurisdiction by state courts over national banks exists only to the extent that it has been authorized by Congress.

R. S. U. S. Sec. 5198, and the act of July 12, 1882 (U. S. Comp. St. 1916, Sec. 9668), mentioned by the Supreme Court of the State in this connection, are, it must be admitted, expressed in broad terms. Still, it may well admit of doubt whether Congress intended to confer upon the state courts jurisdiction of the extraordinary prerogative proceedings, such as was invoked in this case, even in a suit brought by the Government of the United States. Especially is this true in view of the terms of the 16th sub-

division of Section 24 of the Judicial Code (Comp. St. Sec. 991 Sub. 16), making plain and adequate provision for proceedings such as here by the National Government against its banking associations in its own courts. Probably the intention of Congress was, for convenience sake, to confer jurisdiction on the courts of the states only as to such ordinary litigation to which national banks might be parties. The intention to invest them with power to determine high prerogative writs such as here concerning the functions of national banks may well be doubted.

2. The opinion of the State Supreme Court is obscure with respect to the state statutes mentioned in the opinion (R. S. Mo. 1919, Secs. 11684 and 11737). These statutes are part of the system regulating the operations of *banks charted under the law of the state*. So interpreted, they are valid (presumably) whether commendable or otherwise. But in the discussion of the charter powers of a national bank; or of the right of the state to exercise supreme sovereignty with respect thereto, or with respect to the exercise thereof, these statutes simply have no place.

The powers of national banks are drawn exclusively from another source than state legislation, and the latter can neither confer nor restrain these. While the State, in legislating for the community, may enact regulations which are binding upon national banks

in their private relations with the community (and cases of that type are cited by the state court as the basis for its judgment), it is not within its power to amend, restrain or limit the charter powers of such, or regulate their exercise, because these are drawn from another source. Some of the cases so declaring will be presently cited when we come to deal with the right of the State to maintain this proceeding.

3. The question of the right of the State to take over the functions of the National Government in the manner in which it has been attempted in this case; and by use of a writ, an unquestioned prerogative of the sovereign to which the petitioner owes supreme allegiance, restrain the petitioner in the exercise of its corporate functions, and assume to delimit the boundaries of its charter, is a question which was made and settled in principle, adversely to the right, almost at the inception of our National Government.

The function of the writ of *quo warranto,* or the information which is the modern substitute, was dealt with by this Court in Ames v. Kansas, 111 U. S. 460. As there explained it was a "*writ of right by the King,*" against one who had usurped franchises or liberties, which the King might have granted, but asserted that he had not. With the Declaration of

Independence, and the formation of our dual sovereignty, the rights of the Crown passed to the new sovereign. But which sovereign? It is not possible for both the State and the General Government to be supreme in the same field and with respect to the same subject matter. Sovereignty cannot be concurrent, else it is not sovereignty. This whole matter was fought out and put at rest in McCulloch v. Maryland, 4 Wheat. 316, and Osborne v. United States Bank, 9 Wheat. 738, upon enunciations often since followed and applied. Those landmarks in our judicial history did more than deny the power of the State to tax a bank created by the United States. They dealt fundamentally with the relations of the two governments; and the relations of the state government to a bank chartered by the general government. There is not a line or syllable in either opinion which does not negative the power which has here been asserted and maintained. The remarks of Mr. Justice Swayne, speaking for the Court in Farmers etc. Bank v. Dearing, 91 U. S. 34, are to the same effect. In Territory v. Lockwood, 3 Wall. 238, it was held that the writ of *quo warranto* as a motion from an office under the federal government, could be instituted only by that government. In McClung v. Silliman, 6 Wheat. 603, the right of a state court to direct a writ of *mandamus* to the

Register of an United States land office was denied. In Ableman v. Booth, 21 How. 516, Mr. Chief Justice Taney graphically stated that the power of the state to interfere with functions of the Federal Government, or matters committed to its charge, was exactly equal to, but no greater than its power to interfere with matters happening beyond its geographical boundaries. Upon such considerations, in State v. Bowen, 8 S. C. 400, the Supreme Court of that state denied the power of the state, through such a writ as here, to remove a presidential elector from office, although the claim made was that he was not in fact an elector. The Supreme Court of Errors and Appeals of Connecticut in State *ex rel.* Attorney-General v. Curtis, 35 Conn. 374, in an unanswerable opinion, denied to that state the power which the Supreme Court of Missouri have here asserted in behalf of that sovereignty.

In First National Bank v. Union Trust Company, 244 U. S. 418, the members of the court, while in disagreement as to whether by express enactment Congress had given the state the right to proceed in that case and in relation to the power there asserted, were a unit in the view that, unless Congress had authorized the state to restrain a national bank within the asserted limits of its charter, the state had no right to attempt to do so. In respect to

the subject matter here under inquiry, no such right has been conferred by Congress upon the state.

Are there those who would contend that the general government might thus attempt to restrain within the supposed limits of the legislative grant, corporations created by the state? And if not, what considerations make for the denial of the power in the one case which do not equally apply in the other?

That the United States might, or may, maintain such a proceeding as here to delimit the corporate powers of this bank, and restrain the activities thereof within the limits thus defined, goes without saying. That such is the exercise of a supreme sovereign power is equally manifest. Under our form of government it is fundamentally impossible that supreme sovereign power as to the same subject matter may rest both in the National Government and that of the state. In the infancy of the Republic, it was the anxious duty, but high prerogative of this Court to declare these fundamentals with respect to the relations of the national and state governments, on the due respect for which the perpetuity of our institutions must depend.

The present necessity of again enforcing them may be of service in this hour of social unrest.

The argument advanced by the state court on the question is specious, but not sound. It is that Congress has not conferred the asserted power upon

the bank; its exercise is contrary to the laws of the state, hence the state may interfere to prevent its exercise. In its ultimate analysis, this position is equivalent to the assertion that where, upon judicial inquiry, it is found that the asserted power has been granted a national bank, only the National Government can conduct the inquiry. But where it has not been granted, the state may intervene. Under this reasoning, the prosecution of *ill-founded* proceedings of this type is the exclusive function of the National Government; those which are *well-taken* are among the functions pertaining to the state.

4. The question presented on the merits is this:

May a national bank have *more than one place of business* within the county, city, town or village where, by its certificate of organization, it is authorized to do business?

The only requirement with regard to the bank's place of business is found in R. S. 5134 (Comp St., Sec. 6959) that the certificate of organization shall specify:

> "2. The *place* where its operations of discount and deposit are to be carried on, designating the state, territory or district, and the particular county, city, town or village."

"Place" means the town or city, and not the office or building, where the business is carried on.

> McCormick v. National Bank, 165 U. S. 538, *l. c.* 549 (s. c.), 162 Ill. 100, 44 N. E. 381, 61 Ill. at 30.

The only other pertinent provision is found in R. S. 5190 (Comp. St., Sec. 9744), which reads:

> "The *usual business* of each national bank shall be transacted at *an office* or *banking house* located in the *place* specified in its organization certificate."

The Supreme Court of Missouri makes the fundamental error of construing this provision as a limitation of the number of offices or banking houses which a national bank may maintain in the place where it is authorized to do business. The question turns on the proper construction to be given to the particular words, "an office or banking house." The Missouri court construed these words as though they were written:

> "The usual place of business of each national bank shall be transacted at *one office* or *one banking house* located in the *place*," etc.

A national bank has a *charter right* to do business at *any location* within the designated county, city, town or village. This charter power did not, in ex-

press terms, limit the bank to *one location* within the designated county, city, town or village. If it had been the congressional intent to so limit the bank to one location, it would have been quite easy to have said "*one* office" or "*one* banking house," as the Missouri court now says for it.

The indefinite article "a" or "an" is not usually a word of limitation.

> "As by its derivation, so also in meaning, *an* or *a* is a weaker or less distinct *one*.
>
> "Usually, as the indefinite article proper, it points out, in a loose way, as one of a *class* containing *more* of the *same kind*." (*Century Dictionary*).

The Constitution of Arkansas provides that for each circuit "*a* judge shall be elected."

The Arkansas Legislature passed an act providing for "an additional judge" for the Sixth Circuit.

The Attorney-General filed *quo warranto*, alleging that the act was unconstitutional, and contended that the letter "a" before the word "Judge" in the constitution was "a limitation upon the power of the Legislature to provide for more than one Judge in a judicial circuit."

The Court, in refusing the writ, said (State *ex rel.* v. Martin, 60 Ark. 343, 28 L. R. A. 153):

> "Now the adjective 'a,' commonly called the 'indefinite article,' and so called, too, because it *does not define any particular person or thing,* is entirely too indefinite, in the connection used, to define *or limit the number* of judges which the legislative wisdom may provide for the judicial circuits of the state. And it is perfectly obvious that its office and meaning was well understood by the framers of our constitution, for nowhere in that instrument do we find it used as a *numerical limitation.* * * * According to Mr. Webster 'a' means 'one' *or* 'any,' but less 'emphatically than either.' It may mean one where only one is intended. That is the trouble. *Of itself it is in no sense a word of limitation.* * * * The constitution requires 'a judge' for each circuit, and there must be *at least one judge. But where is the limitation* upon the Legislature to provide for more if the necessity arises. * * * "

The Supreme Court of Massachusetts says:

> "The article 'a' is not necessarily a singular term. It is often used in the sense of 'any' and is then applied to more than one individual object."

National Union Bank v. Copeland, 171 Mass. 257, 4 N. E. 794;

See Thompson v. Association, 8 Common Bench Reports 848;

European Cent. R. Co. v. Westall, 6 Best & Smith 970.

The Congress, in enacting this section, was dealing with two classes of business done by national banks, the "usual" and the "unusual." As to the latter, the *unusual business,* this section impliedly recognizes the practice—indeed, the necessity—of doing this where the occasion and conditions call for it to be done. As to the former, its *usual* business, the regulation is that this shall be done at the *place* (*i. e.,* the city, town or village) designated in its organization certificate and at an office or banking house, *i. e.,* a place of business. This section does not *inhibit* more than one *place of business.*

A national bank is authorized to do the "business of banking" within a designated county, city, town or village. (See Section 9661 [R. S. 5136].)

This is part of its *express powers.*

But it also has implied or unexpressed powers "such *incidental powers* as shall be necessary to carry on the business of banking" (Section 9661, R. S. 5136).

Implied powers include not merely what is *strictly necessary,* but whatever, *not being expressly prohibited,* may "fairly be regarded as *incidental* to the *objects* for which the corporation is created."

Green Bay R. R. v. Steamboat Co., 107 U. S. 98, 100.

An implied power is one that is "*needful, suitable* and *proper* to accomplish the *object* of the grant, and one that is directly and immediately *appropriate* to the execution of the specific powers" granted.

People v. Pullman P. C. Co., 175 Ill. 125, 136.

> "A power which is obviously *appropriate and convenient* to carry into effect the franchise granted has always been deemed a *necessary* one."

State v. Hancock, 35 N. J. L. R. 537, 545.

That the privilege of maintaining two or more offices or banking houses is clearly needful, suitable and proper, and appropriate and convenient, to the exercise of the banking business, is *demonstrated* by the frequent exercise of this privilege by state banks and trust companies in many of our larger business centers.

A privilege successfully exercised by banks organized under state governments is certainly *suitable, proper, appropriate* and *convenient* to a like institution organized under an act of Congress.

The implied powers of the Constitution have grown and developed with the growth and development of our country and our civilization. Like growth should be an incident of the *implied powers* of a national

bank or other corporation, for these mean, as shown, what *is, or has become,* suitable, appropriate or convenient.

> "The authority of a corporation to perform a particular act is always dependent to a very considerable extent upon the facts and circumstances *at the time when it is proposed to perform the act.*"
>
> 7 R. C. L. 513.

Respectfully submitted,

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